RECORD AND BRIEFS

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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
THOMAS J. KARR
Assistant General Counsel
STEPHEN G. YODER
Senior Litigation Counsel
DINA B. MISHRA
Attorney
Securities And Exchange Commission
Washington, D.C. 20549

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, prohibits employer retaliation against whistleblowers who make specified disclosures. 15 U.S.C. 78u-6(h)(1). The question presented is as follows:

Whether that prohibition encompasses retaliation against individuals who report violations of the securities laws to company management but not to the Securities and Exchange Commission.

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INTEREST OF THE UNITED STATES

The question presented in this case concerns the scope of the prohibition on employer retaliation against whistleblowers that is imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376. The United States has a substantial interest in the resolution of that question. The Department of Justice and the Securities and Exchange Commission (Commission) administer and enforce provisions of Dodd-Frank, including the anti-retaliation provisions codified at 15 U.S.C. 78u-6(h)(1), and other federal securities laws. The Commission has issued a rule that addresses the question presented, 17 C.F.R. 240.21F-2(b), and the Commission filed an amicus brief supporting respondent in the court of appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in this brief's appendix. App., *infra*, 1a-30a.

STATEMENT

1. In the wake of the 2008 financial crisis, Congress enacted Dodd-Frank to "promote the financial stability of the United States by improving accountability and transparency in the financial system." 124 Stat. 1376. Dodd-Frank responded to numerous perceived shortcomings in financial regulation, including the failure of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), Pub. L. No. 107-204, 116 Stat. 745, to prevent retaliation against corporate whistleblowers who alerted internal management about securities-law violations and fraud.

In particular, Members of Congress expressed concern that whistleblowers at Lehman Brothers had "tried to alert management to illegal accounting tricks," but were "fired" in retaliation for their internal disclosures. 156 Cong. Rec. 7235, 7236 (2010); see *id.* at 7083-7084 (Lehman Brothers did not "listen to the alarms that were sounded in [its] own company, * * * [i]nstead, those people who were trying to tell the truth were forced out."); *Hearing Before the House Committee on Financial Services: Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner*, 111th Cong., 2d Sess. 68, 75-77, 128, 175-178 (2010) (describing Lehman Brothers whistleblowers, including one who was fired days after informing internal management about improper accounting practices and another at a Lehman Brothers subsidiary who was fired for disclosures to the FBI).

To address that problem, among others, Congress included two distinct measures in Section 922 of Dodd-

Frank, codified at 15 U.S.C. 78u-6, that "extend[] protection comprehensively to corporate whistleblowers." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014).

a. First, Section 78u-6 creates an *award* program for whistleblowers who provide useful information to the Commission. Subsection (a) states that "[i]n this section the following definitions shall apply," and then defines six terms that are used to delineate the award program: "covered judicial or administrative action," "Fund," "original information," "monetary sanctions," "related action," and "whistleblower." 15 U.S.C. 78u-6(a). The term "whistleblower" is defined as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). Subsections (b)-(g) govern the operation of the whistleblower award program. 15 U.S.C. 78u-6(b)-(g).

b. Second, Section 78u-6 prohibits *retaliation* by employers against whistleblowers. Subparagraph (h)(1)(A) provides that, in three specified scenarios, "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower." 15 U.S.C. 78u-6(h)(1)(A).

Clause (i) prohibits retaliation against a whistleblower for lawful acts in "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i). Clause (ii) prohibits retaliation against a whistleblower for lawful acts in "initiating, testifying in, or assisting in any investigation or

judicial or administrative action of the Commission based upon or related to [the] information" provided to the Commission under clause (i). 15 U.S.C. 78u-6(h)(1)(A)(ii).

Clause (iii) was added late in the legislative process, after both Houses of Congress had passed bills that included only clauses (i) and (ii), and amid the discussion of Sarbanes-Oxley's failure to protect internal whistleblowers at Lehman Brothers. See p. 2, *supra*; H.R. 4173, 111th Cong. § 922(a) (2010) (conference base text approved for use by the Senate in May 2010). Clause (iii) prohibits retaliation against a whistleblower for lawful acts in "making disclosures that are required or protected under" several cross-referenced laws, including Sarbanes-Oxley; the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*,[1] "including section 78j-1(m)"[2]; 18 U.S.C. 1513(e); and "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii).

The laws cross-referenced by clause (iii) require or protect disclosures to other entities in addition to the Commission. Sarbanes-Oxley, for example, includes a provision entitled "Whistleblower Protections for Employees of Publicly Traded Companies," that prohibits employer retaliation against employees for disclosing violations of certain securities and fraud laws to any federal "regulatory or law enforcement agency," "any Member of Congress or any committee of Congress," or

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[1] The whistleblower provisions of Dodd-Frank are codified as Section 21F of the Exchange Act, which clause (iii) incorporates by reference through the phrase "this chapter." 15 U.S.C. 78u-6(h)(1)(A)(iii).

[2] Section 78j-1(m) was enacted through Sarbanes-Oxley, 116 Stat. 775-777, and is codified as part of the Exchange Act.

"a person with supervisory authority over the employee." 18 U.S.C. 1514A(a)(1). Another provision of Sarbanes-Oxley—one that clause (iii) expressly singles out—protects certain internal disclosures about auditing matters. 15 U.S.C. 78j-1(m)(4). Similarly, Sarbanes-Oxley *requires* attorneys representing public companies to disclose securities-law or fiduciary-duty violations to specified company officials, not to the Commission. 15 U.S.C. 7245; see 17 C.F.R. 205.3.

The Exchange Act, which clause (iii) also cross-references, similarly requires registered public accounting firms to report illegal acts discovered during certain audits to the audited public company's management. 15 U.S.C. 78j-1(b). Another statute that clause (iii) cross-references, 18 U.S.C. 1513(e), prohibits harmful retaliation against any person for "providing to a law enforcement officer any truthful information relating to" a federal offense. And numerous other laws, rules, or regulations "subject to the jurisdiction of the Commission," 15 U.S.C. 78u-6(h)(1)(A)(iii), require internal reporting.[3]

c. Like a "person" who alleges a violation of the whistleblower provisions of Sarbanes-Oxley, 18 U.S.C. 1514A(b), an "individual" who alleges a violation of Dodd-Frank's anti-retaliation provisions may seek relief from his or her employer, 15 U.S.C. 78u-6(h)(1)(B)(i). The remedial schemes created by the two

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[3] See, *e.g.*, 17 C.F.R. 270.38a-1(a)(4) (mutual fund's chief compliance officer must report material compliance matters to fund's board); 17 C.F.R. 240.17a-5(h) (broker-dealer's auditor must report material inadequacies to broker-dealer's chief financial officer); 17 C.F.R. 275.204A-1(a)(4) (investment adviser must adopt code of ethics requiring supervised persons to report violations thereof to chief compliance officer).

statutes, however, differ significantly. Sarbanes-Oxley directs an aggrieved person to file a complaint with the Department of Labor (DOL), which can either adjudicate the claim through an administrative process subject to review by a federal court of appeals, or leave the person to bring a cause of action in federal district court. *Ibid.*; 49 U.S.C. 42121(b); 29 C.F.R. 1980.103-.110, 1980.114. Dodd-Frank, by contrast, allows an immediate action in federal district court. 15 U.S.C. 78u-6(h)(1)(B)(i). Sarbanes-Oxley includes a six-month baseline statute of limitations, 18 U.S.C. 1514A(b)(2)(D), while Dodd-Frank's baseline statute of limitations is six years, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(aa). And Sarbanes-Oxley provides that an employee "shall be entitled to all relief necessary to make the employee whole," including back pay, 18 U.S.C. 1514A(c)(1), while Dodd-Frank authorizes double "the amount of back pay otherwise owed," 15 U.S.C. 78u-6(h)(1)(C)(ii).

d. Section 78u-6 authorizes the Commission to "issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section." 15 U.S.C. 78u-6(j).

2. In 2011, the Commission issued Rule 21F-2 and related rules addressing both the award and anti-retaliation provisions of Section 78u-6. See 76 Fed. Reg. 34,300 (June 13, 2011).

For purposes of the award program, Rule 21F-2 states that "[y]ou are a whistleblower if, alone or jointly with others, you provide the Commission with information" related "to a possible violation of the Federal securities laws" pursuant "to the procedures set forth in" another Commission rule. 17 C.F.R. 240.21F-2(a),

That other rule requires information to be submitted either through the Commission's website or by mailing or faxing a form to the Commission's Office of the Whistleblower. 17 C.F.R. 240.21F-9(a).

For purposes of the anti-retaliation provisions, Rule 21F-2 states that a person is a "whistleblower" if he provides information that he reasonably believes relates to a possible violation of the securities or certain criminal fraud laws, and if he "provide[s] that information in a manner described in" clauses (i) through (iii) of 15 U.S.C. 78u-6(h)(1)(A)—that is, to the Commission as part of the whistleblower award program, through certain forms of participation in a Commission proceeding, or through disclosures protected or required by the laws cross-referenced in clause (iii), which protect internal disclosures and do not require reporting to the Commission. 17 C.F.R. 240.21F-2(b)(1).[4]

In adopting its rules, the Commission explained that encouraging reporting through *internal* compliance procedures, such as those required or protected by the laws cross-referenced in clause (iii), advances the purposes of Section 78u-6. Specifically, the Commission explained that internal reporting enables the private sector to screen out meritless claims, and thereby improves the quality of whistleblower tips later brought to the Commission; that internal reporting gives businesses the opportunity to self-correct without the need for intrusive Commission investigations; and that internal re-

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[4] In 2015, the Commission issued an interpretive rule explaining that a whistleblower is protected from retaliation even if he does not utilize the channels established by the Commission for the award program—*i.e.*, by reporting through the Commission's website or its Office of the Whistleblower. 80 Fed. Reg. 47,829 (Aug. 10, 2015).

porting thereby promotes efficient use of both corporate and government resources. See 76 Fed. Reg. at 34,323-34,325, 34,359 & nn.449-450 (citing S. Rep. No. 176, 111th Cong., 2d Sess. 110 (2010)).[5] The Commission also considered and responded to public comments, many of which urged the agency to adopt rules that would encourage or require internal reporting. *E.g.*, *id.* at 34,302 n.21, 34,326 n.230 (citing comment letters from the U.S. Chamber of Commerce).

3. Petitioner is a public company operating as a real estate investment trust. Pet. App. 14a. Respondent was a portfolio-management vice president employed by petitioner from 2010 to 2014. *Id.* at 3a, 14a. Respondent has alleged that he made multiple reports to petitioner's senior management about alleged securities-law violations by his supervisor, including elimination of internal corporate controls in violation of Sarbanes-Oxley, hiding millions of dollars in cost overruns, and granting no-bid contracts and unsubstantiated payments to friends. *Id.* at 3a, 14a-15a. Respondent has further alleged that petitioner fired him because of his disclosures. *Ibid.* It is undisputed that respondent did not "report his concerns to the SEC before [petitioner] terminated his employment." *Id.* at 3a.

Respondent filed this lawsuit. His complaint alleged, *inter alia*, that petitioner had fired him for making disclosures that were required or protected under Sarbanes-Oxley and thus were protected by clause (iii) of

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[5] The Commission's rules governing the whistleblower award program also underscore the benefits of internal reporting in advancing the purposes of Section 78u-6. See 17 C.F.R. 240.21F-4(b)(7) and (c)(3), 240.21F-6(a)(4) and (b)(3) (treating internal reporting as assisting in establishing whistleblower award eligibility and in enhancing award amount).

the anti-retaliation provisions in 15 U.S.C. 78u-6(h)(1)(A)(iii). Pet. App. 3a, 14a-15a. Petitioner moved to dismiss the suit, arguing that respondent was not a "whistleblower" under Section 78u-6 because he had not provided information "to the Commission" as required by the definition of "whistleblower" in 15 U.S.C. 78u-6(a)(6). Pet. App. 3a, 17a-18a.

4. The district court denied petitioner's motion to dismiss. Pet. App. 12a-43a. The court explained that clause (iii)'s protection of disclosures by whistleblowers under statutes (like Sarbanes-Oxley) that require or protect disclosures to entities other than the Commission "conflict[s] with the assumption that only those who report to the" Commission are protected. *Id.* at 33a. The court observed that, in circumstances where applying a statutory definition "would cause a provision to contradict another provision, whereas the normal meaning of the word would harmonize the two, the normal meaning should be applied." *Id.* at 28a (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 228 (2012)). The court held that the tension between the anti-retaliation protections and the statutory definition created ambiguity, and that the Commission's reasonable interpretation in Rule 21F-2 was entitled to deference. *Id.* at 35a-41a.

5. On interlocutory appeal, the court of appeals affirmed. Pet. App. 1a-11a.

The court of appeals concluded that Section 78u-6's "definitional provision * * * should not be dispositive of the scope of [Section 78u-6's] later anti-retaliation provision." Pet. App. 7a. The court explained that limiting retaliation protection to whistleblowers who report to the Commission "would make little practical sense and undercut congressional intent" because it

"would, in effect, all but read [clause] (iii) out of the statute." *Id.* at 8a. The court stated that it would avoid that "illogical" result by applying the statutory definition only to the whistleblower-award provisions. *Ibid.* As an alternative ground for its decision, the court of appeals joined the Second Circuit by concluding that "the agency responsible for enforcing the securities laws"—the Commission—"has resolved any ambiguity and its regulation is entitled to deference." *Id.* at 10a; see *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 146, 150-155 (2d Cir. 2015).

Judge Owens dissented. Pet. App. 11a. He would have followed the reasoning of Judge Jacobs's dissent in *Berman*, 801 F.3d at 155, and the panel opinion in *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013). Pet. App. 11a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that 15 U.S.C. 78u-6(h)(1)(A)(iii) prohibits employers from retaliating against whistleblowers who make specified disclosures, regardless of whether those whistleblowers report to the Commission.

A. Section 78u-6 establishes two distinct measures to encourage whistleblowers to report potential securities-law violations and fraud. First, the provision creates an award program for whistleblowers who bring valuable information to the Commission. Second, the provision prohibits job-related retaliation against whistleblowers who make specified types of disclosures. The text and structure of the statute indicate that the specialized definition of "whistleblower" applies to the award program but not to the retaliation prohibitions.

Subsection (a) of Section 78u-6 defines six terms, each of which appears in the award provisions created

in Subsections (b) through (g), and each of which fits naturally there. The term "whistleblower," for example, requires reporting to the Commission, consistent with the fact that awards are available only after successful Commission actions.

Except for "whistleblower," however, none of Section 78u-6's defined terms appears in the anti-retaliation provisions of paragraph (h)(1). The statutory text and structure indicate that paragraph (h)(1) uses "whistleblower" in accordance with its ordinary meaning, not as a term of art that requires reporting to the Commission. Subparagraph (h)(1)(A) contains three clauses that prohibit retaliation for three distinct types of whistleblowing. The first two clauses reference reports to the Commission, but clause (iii) does not—a textual distinction that should be read to make a substantive difference. Indeed, clause (iii) protects disclosures under laws that themselves protect or even require "[w]histleblower[s]" to report to entities other than the Commission. 18 U.S.C. 1514A(a)(1).

Extending the specialized definition of "whistleblower" to clause (iii) would markedly narrow the ban on employer retaliation and would create anomalies inconsistent with the statutory language and design. Under petitioner's reading, clause (iii) would prohibit employers from retaliating only against employees who have reported to the Commission. But employers generally do not know that an employee has reported to the Commission, which is required to keep reports confidential, so petitioner's reading would substantially diminish the retaliation prohibition's deterrent effect. In addition, under petitioner's reading, clause (iii) would not protect an employee who reports a suspected securities-law violation to company management, in the

hope of triggering internal compliance mechanisms that will make a report to the Commission unnecessary, and who is fired immediately thereafter. Excluding such persons from Dodd-Frank's protections would depart from usual understandings of the term "whistleblower" and would undermine Congress's effort to promote more rigorous and effective internal compliance programs.

This Court has often confirmed that a statutorily defined term may retain its ordinary meaning where necessary to give effect to the language and objective of a statute. The court of appeals applied that sensible approach, preserving the specialized meaning of "whistleblower" in the award provisions, while applying its ordinary meaning to facilitate the effective implementation of the anti-retaliation provisions.

B. The legislative background and purpose further support the court of appeals' construction. The specialized definition of "whistleblower" that requires reporting to the Commission first appeared in the bill that became Dodd-Frank at a stage of the drafting process when *only* the award provisions used that term. And clause (iii) of the anti-retaliation provision, which cross-references federal statutes that expressly protect or require disclosures to entities other than the Commission, was adopted at the final stage of the legislative process, after both Houses of Congress had passed the bill. There is no indication that "the conferees who accepted the last-minute insertion of" clause (iii) intended this "subdivision of a subsection" to have "the extremely limited scope it would have" if the term "whistleblower" is construed to require reporting to the Commission. *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 154-155 (2d Cir. 2015).

Congress enacted Dodd-Frank against the backdrop of Sarbanes-Oxley, which protects *internal* whistleblowers who report securities-law violations to corporate management, but which had failed to expose improper financial practices that precipitated the 2008 financial crisis. As its cross-reference to Sarbanes-Oxley and creation of new remedies demonstrate, Section 78u-6(h)(1) is intended to strengthen protections for internal whistleblowers. Reading that provision to protect only whistleblowers who report to the Commission would defeat Congress's purpose, weaken internal corporate-compliance programs, and potentially flood the Commission with allegations that have not been vetted by the corporate insiders best situated to address them in the first instance.

C. At a minimum, the tension between the specialized definition of "whistleblower" in Subsection (a) and its more natural meaning in paragraph (h)(1) creates an ambiguity for the Commission to resolve. The Commission did so reasonably, pursuant to an express conferral of rulemaking authority, after following notice-and-comment procedures, and with a careful explanation drawing on its expertise in securities law. Petitioner's new assertion of procedural deficiencies in the rule is forfeited, outside the question presented, and without merit. The Commission's reasonable reading of Section 78u-6(h)(1) to protect both internal and external whistleblowers is entitled to deference.

ARGUMENT

THE PROHIBITION ON EMPLOYER RETALIATION AGAINST WHISTLEBLOWERS IN 15 U.S.C. 78u-6(h)(1) IS NOT LIMITED TO WHISTLEBLOWERS WHO REPORT TO THE COMMISSION

Section 78u-6 includes two distinct measures to encourage whistleblowers to report securities-law violations: awards for whistleblowers who bring valuable information to the Commission, and protection against job-related retaliation for whistleblowers who make described disclosures. The specialized definition of "whistleblower" codified in Subsection (a), which requires reporting to the Commission, fits naturally with the award program. Use of that definition in paragraph (h)(1), however, would subvert the effective implementation of the anti-retaliation provisions, which protect disclosures to other entities as well. The text and structure of the statute as a whole, as well as Congress's overriding policy of encouraging internal reporting through corporate-compliance mechanisms, indicate that the ordinary meaning of "whistleblower" applies to the anti-retaliation provisions. At a minimum, the Commission's rule adopting that interpretation, issued after notice-and-comment procedures and pursuant to an express statutory conferral of rulemaking power, is a reasonable resolution of statutory ambiguity and is accordingly entitled to deference.

A. The Statutory Text And Structure Indicate That The Anti-Retaliation Provisions Use The Term "Whistleblower" In Its Ordinary Sense

1. Section 78u-6 prohibits an "employer" from retaliating against "a whistleblower in the terms and conditions of" the whistleblower's "employment because of

any lawful act done by the whistleblower" in three specified contexts. 15 U.S.C. 78u-6(h)(1)(A). Clause (i) prohibits retaliation for "providing information to the Commission in accordance with this section," including the whistleblower award program defined earlier in the Section. 15 U.S.C. 78u-6(h)(1)(A)(i). Clause (ii) prohibits retaliation for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information"—that is, the information provided to the Commission through the prescribed means. 15 U.S.C. 78u-6(h)(1)(A)(ii). Clause (iii) prohibits retaliation for "making disclosures that are required or protected under" several provisions of law, including Sarbanes-Oxley, the Exchange Act, 18 U.S.C. 1513(e), and "any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii).

Read in accordance with its ordinary meaning, the term "whistleblower" is not limited to people who report to the Commission, and it naturally encompasses employees who report wrongdoing to company management. See, *e.g.*, *New Oxford American Dictionary* 1970-1971 (3d ed. 2010) (defining "whistle-blower" as "a person who informs on someone engaged in an illicit activity"); *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/whistleblower ("one who reveals something covert or who informs against another"). That understanding is consistent with the origin of the term—the action of blowing the whistle. See *LaMangue* v. *Massachusetts Dep't of Emp't & Training*, 3 F. Supp. 2d 83, 92 (D. Mass. 1998) ("Whistleblowers may 'blow the whistle' on any number

of persons, about any number of things for any number of reasons.").[6]

The whistleblowing actions protected by subparagraph (h)(1)(A) of Section 78u-6 are not limited to providing information to the Commission. Although clause (i) includes that limitation, clause (ii) encompasses distinct acts of whistleblowing by "initiating, testifying in, or assisting" in Commission proceedings that are "based upon or related to" information provided to the Commission. 15 U.S.C. 78u-6(h)(1)(A)(ii). And clause (iii)'s lack of any such reference to the Commission indicates that "Congress intended a difference in meaning" from the requirement of Commission reporting referenced in clauses (i) and (ii). *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014). That inference is reinforced by clause (iii)'s prohibition of retaliation for "disclosures that are required or protected under" other provisions of law that require or protect disclosures to entitites *other than the Commission*. 15 U.S.C. 78u-6(h)(1)(A)(iii); see pp. 4-5, *supra*. As relevant here, Sarbanes-Oxley provided "[w]histleblower protection" for respondent's disclosure of alleged securities-law violations and fraud to "a person with supervisory authority over" him. 18 U.S.C. 1514A(a)(1)(C). Accordingly, under the ordinary meaning of clause (iii), petitioner was prohibited from firing

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[6] Likewise, numerous federal statutes use "whistleblower" in its ordinary sense. See, *e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, §§ 2(a)(3), (b)(2)(A), 4(a) and (b), 103 Stat. 16, 16, 32; see also *Department of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913, 916 (2015) (describing "whistleblower protection" under the Act).

respondent for his disclosure to company management of alleged corporate wrongdoing.

2. The definition of "whistleblower" codified at 15 U.S.C. 78u-6(a)(6), which requires reporting "to the Commission, in a manner established" by the Commission, does not compel a different result.

a. As petitioner correctly notes (Br. 17-18), statutory definitions "control the meaning of statutory words * * * *in the usual case*." *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (emphasis added). The Court has made clear, however, that this is not an ironclad rule. See *ibid.*; *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 575-576 (2007) (explaining that there is no "irrebuttable 'presumption that the same defined term in different provisions of the same statute must' be interpreted identically"); *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 412 (1983) (noting that a statutory definition is "not dispositive"). Rather, "a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2441 (2014) *(UARG)* (citation omitted); accord Scalia & Garner 228 ("Definitions are, after all, just one indication of meaning—a very strong indication, to be sure, but nonetheless one that can be contradicted by other indications."). That is true even when the definitional provision states expressly that the specialized meaning applies to a particular section or chapter of a law. See *UARG*, 134 S. Ct. at 2441; *Duke Energy*, 549 U.S. at 576.

This Court has accordingly declined to apply "in mechanical fashion" statutory definitions that would "create obvious incongruities in the language" of a statute

or "destroy one of the major purposes" of the law. *Suwannee Fruit*, 336 U.S. at 201; see, *e.g.*, *UARG*, 134 S. Ct. at 2441; *Duke Energy*, 549 U.S. at 575-576; *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343-346 (1997); *United States* v. *Public Utilities Comm'n of Cal.*, 345 U.S. 295, 312-313 (1953). That is especially true when a statutory definition conflicts with the defined term's "most natural" meaning. *Philko*, 462 U.S. at 411; see *Suwannee Fruit*, 336 U.S. at 201; *Franklin Cal. Tax-Free Trust* v. *Puerto Rico*, 805 F.3d 322, 340 (1st Cir. 2015) ("Where statutory definitions give rise to such problems, a term may be given its ordinary meaning."), aff'd, 136 S. Ct. 1938 (2016).

In some cases, the ordinary meaning adopted may be narrower than the statutory definition, see, *e.g.*, *UARG*, 134 S. Ct. at 2441-2442; in other cases, the ordinary meaning adopted may be broader than the statutory defintion, see, *e.g.*, *Suwannee Fruit*, 336 U.S. at 201-206 (adopting the "broader and more usual" meaning of "disability," rather than treating the word as a specialized statutory "term of art"). In all cases, "[c]ontext counts." *Duke Energy*, 549 U.S. at 576.

b. The definition on which petitioner relies states that "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). The "manner established" by Commission rule is by reporting "[o]nline, through the Commission's Web site," or "[b]y mailing or faxing a" specified form "to the SEC Office of the Whistleblower." 17 C.F.R. 240.21F-9(a).

This specialized definition of "whistleblower," like the five other definitions contained in Subsection (a), fits naturally with the whistleblower *award* program created by Subsections (b)-(g) of Section 78u-6. Dodd-Frank directs the Commission to pay awards to "whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). By defining the term "whistleblower" to mean a person who reports wrongdoing "to the Commission," Section 78u-6(a)(6) incorporates a fundamental eligibility criterion under the award program. Likewise, because the payment of awards is governed by "regulations prescribed by the Commission," *ibid.*, a whistleblower must report "in a manner established * * * by the Commission," 15 U.S.C. 78u-6(a)(6). And because the award program allows multiple whistleblowers to divide an award of a statutorily limited amount, 15 U.S.C. 78u-6(b)(1), either a single "individual * * * or 2 or more individuals acting jointly" can qualify as a "whistleblower," 15 U.S.C. 78u-6(a)(6). Applying the specialized definition of "whistleblower" in Subsection (a) to the award program created by Subsections (b)-(g) thus accords with the fundamental rule that courts should "interpret the statute as a symmetrical and coherent regulatory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation and internal quotation marks omitted).

c. By contrast, extending the specialized definition of "whistleblower" in Subsection (a) to the anti-retaliation protections in paragraph (h)(1) would "create obvious incongruities in the language." *Suwannee Fruit*, 336 U.S. at 201. None of the other five terms de-

fined in Subsection (a)—"covered judicial or administrative action," "Fund," "original information," "monetary sanctions," or "related action"—appears in paragraph (h)(1). 15 U.S.C. 78u-6(a). Rather, all of those terms are used exclusively in Subsections (b)-(g), which define and delimit the award program. Although the term "whistleblower" is both defined in Subsection (a) and used in paragraph (h)(1), extending the specialized definition to the anti-retaliation provisions would produce "substantive effect[s]" not "compatible with the rest of the law." *UARG*, 134 S. Ct. at 2442 (citation omitted); see *Public Utilities Comm'n*, 345 U.S. at 312 (departing from specialized statutory definition based on "the statutory scheme as a whole").

Most significantly, applying the specialized definition of "whistleblower" to the anti-retaliation provisions in paragraph (h)(1) would "vitiate much of the protection afforded by" the ordinary meaning of clauses (ii) and (iii). *Robinson*, 519 U.S. at 345. Clause (ii) prohibits job-related retaliation against a whistleblower "because of any lawful act done by the whistleblower * * * in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission" that is "based upon or related to" information provided to the Commission under Section 78u-6. 15 U.S.C. 78u-6(h)(1)(A)(ii). Petitioner's argument logically implies that an individual who testifies in a Commission enforcement action is protected from retaliation only if he falls within Section 78u-6(a)(6)'s definition of "whistleblower." Under that approach, an employer could fire an employee for giving such testimony if the employee had not previously reported to the Commission online or through the specified written form. See 15

U.S.C. 78u-6(a)(6); 17 C.F.R. 240.21F-9(a). That construction "would thwart the premise of" clause (ii)'s protections, which is cause to depart from the statutory definition. *Public Utilities Comm'n*, 345 U.S. at 313.[7]

Extending the specialized definition of "whistleblower" to clause (iii) would do even greater violence to the statutory design. As noted above, pp. 4-5, *supra*, clause (iii) prohibits retaliation against a whistleblower for "making disclosures that are required or protected under" various laws that "require[] or protect[]" disclosures to recipients other than the Commission. 15 U.S.C. 78u-6(h)(1)(A)(iii). The "[w]histleblower protection" provisions of Sarbanes-Oxley incorporated by clause (iii) protect disclosures to any federal "regulatory or law enforcement agency," "any Member of Congress or any committee of Congress," or "a person with supervisory authority over the employee." 18 U.S.C. 1514A(a)(1). A Sarbanes-Oxley provision specifically referenced in clause (iii), 15 U.S.C. 78j-1(m), expressly protects internal disclosures about auditing matters. Other provisions of Sarbanes-Oxley and the Exchange Act *require* certain auditors and attorneys to disclose certain information internally. 15 U.S.C. 78j-1(b) and 7245; see 17 C.F.R. 205.3.[8] And another provision specifically referenced in clause (iii), 18 U.S.C. 1513(e), which protects reports to law enforcement officers

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[7] The limitations that petitioner would place on anti-retaliation suits under paragraph (h)(1) would also severely weaken the confidentiality protections in 15 U.S.C. 78u-6(h)(2)(A), which generally require the Commission to keep reported information secret, because a plaintiff would be required to identify himself as having reported to the Commission in order to bring a cause of action.

[8] Indeed, attorneys are typically prohibited from reporting to the Commission. Pet. App. 7a (citing 17 C.F.R. 205.3(d)(2)).

about federal offenses, necessarily requires reporting to an entity other than the Commission.

Construing clause (iii) to protect only those individuals who report to the Commission would substantially diminish the practical effect of that provision. *Inter alia*, petitioner's reading would deny Section 78u-6 protection to "[l]egions of accountants and lawyers" that Congress concluded are "equipped to bring fraud on investors to a halt," but who must report internally under the laws cross-referenced in clause (iii). *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1168 (2014). That would disserve Congress's objectives by "leav[ing] these professionals vulnerable to discharge or other retaliatory action for complying with the law," *id.* at 1171, and it is incompatible with this Court's characterization of Dodd-Frank as "extending protection comprehensively to corporate whistleblowers," *id.* at 1175.

Auditors and attorneys are not the only potential corporate whistleblowers excluded by petitioner's interpretation of clause (iii). Given that persons who suffer employment-related retaliation *because of* their disclosures to the Commission are separately protected by clause (i), the practical effect of clause (iii) under petitioner's reading is, at most, to extend protection to a "whistleblower who reports misconduct *both* to the SEC *and* to another entity, but suffers retaliation 'because of' the non-SEC disclosure." Pet. Br. 32 (quoting 15 U.S.C. 78u-6(h)(1)(A)(iii)); see *id.* at 22. Petitioner is correct that clause (iii) applies to such individuals. Construing clause (iii) as *limited* to such persons, however, would "shrink to insignificance the provision's ban on retaliation" and produce anomalous results. *Lawson*, 134 S. Ct. at 1166.

Of the whistleblowers who received awards from the Commission in 2016, about 80% reported internally before reporting to the Commission. SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 18. There are numerous reasons why employees tend to report internally first, including loyalty to the organization, hope that supervisors will rectify or explain the perceived misconduct without the need for government intervention, or (as with auditors and attorneys) a legal obligation to raise a matter in-house. See Janet P. Near & Marcia P. Miceli, *After the Wrongdoing: What Managers Should Know About Whistleblowing*, 59 Bus. Horizons 105, 105, 113 (2016). Studies also show that retaliation for internal reporting, when it occurs, generally follows quickly. See *International Handbook on Whistleblowing Research* 242 (A.J. Brown et al. ed., 2014). The persons whom clause (iii) would protect under petitioner's reading—*i.e.*, those who report both internally and to the Commission, and who suffer retaliation because of the internal reporting—therefore are "likely to be few in number." *Berman*, 801 F.3d at 151; accord Samuel C. Leifer, Note, *Protecting Whistleblower Protections in the Dodd-Frank Act*, 113 Mich. L. Rev. 121, 139 (2014) (noting that "the majority of incentives for and benefits of internal whistleblowing * * * are absent [where] the employee has also reported to the SEC," and "[t]hus, it is hard to imagine what motivations would prompt the employee to make this internal disclosure at all").[9]

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[9] Petitioner cites several cases (Br. 32-33 & n.4) in which whistleblowers reported both internally and to the Commission. But it is not clear whether the plaintiffs in any of those cases—most of which have arisen under Sarbanes-Oxley rather than under Dodd-

Petitioner identifies no good reason that Congress, having chosen to protect employees from retaliation for internal disclosures, would have wished to make that protection contingent on the employees' making *additional* disclosures to the Commission. Petitioner acknowledges (Br. 32) that "an employer will often be unaware that an employee has reported to the SEC," in part because of the confidentiality protections in 15 U.S.C. 78u-6(h)(2)(A). When an employer fires an employee because of the employee's internal reporting (as respondent alleges occurred here), petitioner's reading of the statute thus makes liability under Section 78u-6 turn on a fact that the employer may not know. That unusual approach would substantially diminish Dodd-Frank's deterrent effect. Such a result would be especially peculiar in the context of an anti-retaliation provision, where liability depends on an employer's *reason* for taking a particular employment-related action. See, *e.g.*, *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011).

Petitioner's reading also creates anomalies for employee whistleblowers. If two employees witness the same fraud on the same day, report that fraud to the same supervisor, and are fired at the same time because of their internal disclosures, petitioner's reading of the statute would allow a cause of action under Section 78u-6 only to the employee "savvy enough to know that [he] should take the counterintuitive step of first reporting to the SEC." *Bussing* v. *COR Clearing, LLC*, 20 F. Supp. 3d 719, 732-733 (D. Neb. 2014). Petitioner identifies no reason that Congress would have wished to make escalation of a concern to the federal government the

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Frank—suffered retaliation because of their internal reporting rather than because of their reporting to the Commission.

only way for an employee to obtain Section 78u-6(h)(1)(A)(iii) protection against retaliation for internal disclosures.

Moreover, nothing in Subsection (a)'s definition of "whistleblower," or in petitioner's interpretation of the statute, requires a temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation. Thus, under petitioner's reading, an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under Section 78u-6 if he had reported an insider-trading violation by his previous employer to the Commission in 2012, since the prior report would bring him within the statutory definition of "whistleblower."[10] But an employee fired for internally reporting the same accounting violation in 2017 without having made a prior report to the Commission would have no such Dodd-Frank protection.[11]

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[10] Petitioner suggests (Br. 38) that, under the court of appeals' approach, clause (iii) would provide "protection in situations having nothing to do with violating the securities laws," such as retaliation against an employee for reporting a colleague's illegal drug sales to the FBI. But to the extent that clause (iii)'s cross-reference to 18 U.S.C. 1513(e) creates that possibility, petitioner's interpretation of the term "whistleblower" does not eliminate it. Rather, under petitioner's interpretation of the statute, an employee who was fired for internally reporting drug-law violations could still invoke clause (iii) so long as the employee had also reported securities-related misconduct to the Commission.

[11] Similarly, because the statutory definition of "whistleblower" is limited to persons who report to the Commission in the manner prescribed by the Commission for the award program, 15 U.S.C. 78u-6(a)(6), an employee fired for internally reporting an accounting violation would have a cause of action under the anti-retaliation provisions if he had reported that violation to the Commission via online

Petitioner argues (Br. 13, 16) that the definitional provision, 15 U.S.C. 78u-6(a)(6), describes "who" is protected, while clauses (i)-(iii) of the anti-retaliation provisions define the "conduct" that is protected. But petitioner's approach would produce an odd disconnect between the two, since the disclosure that caused a plaintiff to *be* a "whistleblower" under the statutory definition could be wholly unrelated to the disclosure that precipitated the alleged retaliation. Rather than divorcing the definition of a protected whistleblower from the acts of whistleblowing for which he is protected, the anti-retaliation provisions are more naturally read to reflect Congress's understanding that a person who makes any of the disclosures described in clauses (i)-(iii) qualifies as a "whistleblower" *by virtue of those disclosures.*[12]

3. This Court can and should avoid the anomalous consequences of petitioner's reading by giving the term "whistleblower" its specialized meaning in the award provisions in Subsections (b)-(g), while applying the "broader and more usual concept of the word" to the anti-retaliation provisions in paragraph (h)(1). *Suwannee Fruit*, 336 U.S. at 201; cf. *Cleveland Indians*, 532 U.S. at 212-216 (rejecting a "symmetrical construction" of identical statutory language based on differences in context). That construction would give meaning to the

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form, but not if he had reported the same violation to the Commission via telephone, see 17 C.F.R. 240.21F-9(a).

[12] Petitioner observes (Br. 23) that the anti-retaliation provisions in the section of Dodd-Frank establishing the Consumer Financial Protection Bureau refer to "covered employees" rather than "whistleblowers." But as respondent explains (Br. 32), those provisions cover a broader range of protected conduct, so "whistleblower" would have been an unnatural term.

"words of the definitional section" throughout most of 15 U.S.C. 78u-6's provisions, while preserving the substantive effect of a "subdivision of a subsection that uses the defined term" in its ordinary rather than its specialized sense. *Berman*, 801 F.3d at 154; see *Bussing*, 20 F. Supp. 3d at 730 ("When the term 'whistleblower' is given its ordinary meaning—for purposes of the retaliation section only—everything falls into place. The broad protections of subsection (iii) are given effect, while rewards under the bounty program are properly limited to whistleblowers who provide tips to the SEC."). In the absence of an "iron rule" that statutory definitions must be applied no matter how incongruous or implausible the result—an interpretive approach this Court has consistently rejected, see *Duke Energy*, 549 U.S. at 576—the court of appeals' sensible reading of the statutory text and structure should be affirmed.[13]

B. The Statutory Background and Purpose Confirm That The Anti-Retaliation Provisions Use The Term "Whistleblower" In Its Ordinary Sense

The background and purpose of Section 78u-6 support the court of appeals' holding that the term "whistleblower" in the anti-retaliation provisions should be given its ordinary meaning.

1. Congress enacted Dodd-Frank to promote financial stability "by improving accountability and transparency in the financial system." 124 Stat. 1376. More specifically, Congress enacted Section 78u-6 against the

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[13] Petitioner's reliance (Br. 18-19) on *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), is misplaced. The Court in *Lamie* did not construe a statutory definition of a particular term, much less announce a categorical rule that a definitional provision must always control.

backdrop of Sarbanes-Oxley, in which Congress had sought to create strong protection for internal whistleblowers, see *Lawson*, 134 S. Ct. at 1162, but which had not adequately protected internal whistleblowers at places like Lehman Brothers, see p. 2, *supra*. The conference committee reconciling the House and Senate versions of Dodd-Frank inserted clause (iii)—which cross-references Sarbanes-Oxley and other provisions protecting internal whistleblowers—into the legislation for the first time shortly after multiple members of Congress had discussed the shortcomings in Sarbanes-Oxley and the need for stronger whistleblower protections. See *ibid.*; Pet. App. 6a.[14]

Under those circumstances, it is "doubtful that the conferees who accepted the last-minute insertion of [clause] (iii) would have expected it to have the extremely limited scope it would have if it were restricted by the Commission reporting requirement in the 'whistleblower' definition." *Berman*, 801 F.3d at 155. At a minimum, there is no basis to "attribute to Congress an intent to offer a broad array of protections with one hand, only to snatch it back with the other, leaving behind protection for only a narrow subset of whistleblowers." *Bussing*, 20 F. Supp. 3d at 733.[15]

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[14] The specialized definition of "whistleblower" first appeared in the bill at a time when the award provisions, but not the retaliation provisions, used the word "whistleblower." See H.R. 3817, 111th Cong. 2d Sess. § 203 [§ 21F(a)-(d), (f), (i)(4) and (g)(1)] (Dec. 17, 2010); H.R. 4173, 111th Cong., 2d Sess. § 7203(a) [§ 21F(a)-(d), (f), (g)(1) and (j)(4)] (introduced in the House Dec. 2, 2009; passed by the House Dec. 11, 2009).

[15] At least one commentator has suggested that Senate Banking Committee staff inserted clause (iii) into the draft legislation specifically to protect internal whistleblowers. See Stephen Kohn, *Clarifying Anti-Retaliation Protections Under Dodd-Frank*, Law 360,

2. Like other "securities laws combating fraud," Section 78u-6 should "be construed not technically and restrictively, but flexibly to effectuate [its] remedial purposes." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386-387 (1983) (internal quotation marks omitted); cf. *Kasten*, 563 U.S. at 11-14 (broadly construing anti-retaliation provisions that protect employees who "file a complaint," to cover oral complaints in light of "the Act's basic objectives"); *Robinson*, 519 U.S. at 346 (construing anti-retaliation provisions in light of their "primary purpose of * * * [m]aintaining unfettered access to remedial mechanisms").

That approach is especially appropriate given the purpose of Section 78u-6 and the practical desirability of encouraging internal whistleblowing as a way to promote corporate compliance. This Court has often emphasized the "strong tradition of professional self-regulation." *North Carolina State Bd. of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1115 (2015); see *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). And numerous provisions of federal law and policy—including but not limited to those cross-referenced by clause (iii)—emphasize the importance of robust corporate-compliance mechanisms. See, *e.g.*, *U.S. Attorney's Manual* 9-28.300.A(7) (2017) (considering existence and effectiveness of corporate-compliance program in decision whether to prosecute); Sentencing Guidelines §§ 8B2.1, 8C2.5(f) (considering corporate-compliance program in sentencing determination).

Reading Section 78u-6's anti-retaliation provisions to protect internal and external whistleblowers alike

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June 22, 2017, https://www.law360.com/articles/936265/clarifying-anti-retaliation-protections-under-dodd-frank.

would "support, not undermine, the effective functioning of company compliance and related systems." 76 Fed. Reg. at 34,323. During its rulemaking, the Commission received numerous comments from businesses and related associations that urged the agency to promulgate rules encouraging or requiring internal reporting. *E.g.*, *id.* at 34,302 n.21, 34,326 n.230. The Commission agreed that internal reporting systems "are essential sources of information for companies about misconduct," and therefore "play an important role in facilitating compliance with the securities laws." *Id.* at 34,323, 34,325. Among other benefits, "[s]creening allegations through internal compliance programs may limit [meritless] claims, provide the entity an opportunity to resolve the violation and report the result to the Commission, and allow the Commission to use its resources more efficiently." *Id.* at 34,359 n.450.

"[W]histleblower reporting through internal compliance procedures can [thereby] complement or otherwise appreciably enhance * * * enforcement efforts," without substituting for them. 76 Fed. Reg. at 34,359 n.450. All this faciliates efficient use of private-sector and government resources, and effectuates Section 78u-6's design to prevent fraud and other securities-law violations. Reading the anti-retaliation provisions to protect only those who report to the Commission, by contrast, would "defeat the purpose of the legislation." *Philko*, 462 U.S. at 412. "A statutory definition should not be applied in such a manner." *Ibid.*

3. Petitioner argues that giving "whistleblower" its ordinary meaning in Section 78u-6's anti-retaliation provisions would render Sarbanes-Oxley "effectively obsolete." Pet. Br. 29; see *id.* at 26-30. But as noted above, Dodd-Frank's legislative history makes clear

that Congress viewed Sarbanes-Oxley as inadequate and wanted to strengthen its protections. See pp. 2, 27-28 *supra*. The statute that Congress enacted reflects that objective. Clause (iii) cross-references the entirety of Sarbanes-Oxley, which necessarily (and intentionally) creates substantive overlap between the two statutes. But the remedial provisions of Section 78u-6 differ from those in Sarbanes-Oxley in important ways, including through a longer statute of limitations, potentially greater back pay, and no administrative-exhaustion requirement. Compare 15 U.S.C. 78u-6(h)(1)(B)(i), (ii), and (C)(iii), with 18 U.S.C. 1514A(b)(1), (c)(2)(B) and (D).

At the same time, Section 78u-6 preserves Sarbanes-Oxley's remedial scheme, see 15 U.S.C. 78u-6(h)(3), which offers its own advantages. *First*, under Sarbanes-Oxley, the DOL administers initial review and investigates claims—a process that can be less costly and stressful than federal-court litigation, particularly for whistleblowers who lack counsel. See 18 U.S.C. 1514A(b)(2); 29 C.F.R. 1980.103-.110, 1980.114. *Second*, Sarbanes-Oxley authorizes a court to award "all relief necessary to make the employee whole," including compensation for special damages such as emotional injuries. 18 U.S.C. 1514A(c)(1) and (2)(C); see also, *e.g.*, *Jones* v. *SouthPeak Interactive Corp.*, 777 F.3d 658, 663 (4th Cir. 2015). *Third*, unlike Section 78u-6, Sarbanes-Oxley now expressly prohibits predispute arbitration agreements, compare 18 U.S.C. 1514A(e), with, *e.g.*, *Khazin* v. *TD Ameritrade Holding Corp.*, 773 F.3d 488, 493 (3d Cir. 2014), and thus could attract whistleblowers who are subject to such agreements. From Fiscal Year 2009 (the year before Section 78u-6's enactment) to Fiscal Year 2016, the annual number of Sarbanes-Oxley

complaints filed with DOL declined by less than 25%. See DOL, *Whistleblower Investigation Data FY2006-FY2016*, https://www.whistleblowers.gov/3DCharts-FY2006-FY2016.pdf. Sarbanes-Oxley thus continues to provide whistleblowers important protections against unlawful retaliation, even after Section 78u-6's enactment.

C. The Commission's Reasonable Interpretation Of Section 78u-6(h)(1) Warrants Judicial Deference

The court of appeals ruled for respondent primarily on the ground that respondent's reading of the statute is correct. Pet. App. 8a. Other courts that have ruled for whistleblowers in respondent's position have done the same. See, *e.g.*, *Bussing*, 20 F. Supp. 3d at 733 ("the result flows from the statute itself"). As an alternative ground for its decision, the court of appeals found the statute ambiguous and deferred to the Commission's reasonable interpretation under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a; accord *Berman*, 801 F.3d at 155 (deferring under *Chevron* because, "at a minimum," the statute is ambiguous and the Commission's interpretation is reasonable). That alternative approach would be appropriate here as well. The Commission's consistent, reasonable, and well-explained formal interpretation warrants *Chevron* deference and should be upheld.

1. When "a statute leaves a gap or is ambiguous," this Court "typically interpret[s] it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute." *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2134, 2142 (2016). If the Court concludes that Dodd-Frank is ambiguous with respect to the question presented here, the

Court should defer to the Commission's reasonable resolution of that ambiguity. See *Duke Energy*, 549 U.S. at 576 (deferring to "customary agency discretion to resolve questions about a statutory definition by looking to the surroundings of the defined term"); *Cleveland Indians*, 532 U.S. at 218-220 (deferring to agency interpretation of statutorily defined term to have different meanings in different parts of statute); *Robinson*, 519 U.S. at 345-346 (same); cf. *Kasten*, 563 U.S. at 14-16 (deferring to agency interpretation of ambiguity in anti-retaliation provision).

The Commission promulgated Rule 21F-2, 17 C.F.R. 240.21F-2, pursuant to an express conferral of rulemaking authority, 15 U.S.C. 78u-6(j), and through notice-and-comment procedures, see 76 Fed. Reg. at 34,300. The Commission issued the rule less than a year after Dodd-Frank was enacted, *ibid.*, and the agency's interpretation has not changed. The Court should accordingly defer to the Commission's interpretation as a reasonable reading of the pertinent statutory language. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001).

Rule 21F-2 states that, for purposes of Dodd-Frank's anti-retaliation provisions, "you are a whistleblower" if, as relevant here, "[y]ou provide [the relevant] information in a manner described in" 15 U.S.C. 78u-6(h)(1)(A). 17 C.F.R. 240.21F-2(b)(1)(ii).[16] The rule thus

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[16] In addition, by stating that "[t]he anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award," Rule 21F-2(b)(1) establishes that an individual can be protected from unlawful retaliation even if he has not reported alleged wrongdoing to the Commission, or if he has reported it to the Commission through means other than those required for award eligibility. 17 C.F.R. 240.21F-2(b)(1)(iii).

declares a person to be a "whistleblower" under Section 78u-6(h)(1)(A) if he makes any of the disclosures that Section 78u-6(h)(1)(A) describes. That reading comports with usual understandings of the term "whistleblower." The Commission thoroughly explained that its interpretation reflects the underlying statutory objectives to provide broad protection for internal and external whistleblowers alike, to encourage corporate managers to address potential violations in the first instance, and to use government enforcement resources as efficiently as possible. 76 Fed. Reg. at 34,323-34,326.

To be sure, for purposes of Section 78u-6(h)(1)'s anti-retaliation provisions, Rule 21F-2 treats as "whistleblowers" some individuals who do not fall within Section 78u-6(a)(6)'s definition of that term. Under this Court's precedents, however, the Commission was not categorically required to apply that definition in construing every Dodd-Frank provision in which the word "whistleblower" appears. See pp. 17-18, *supra*. Based on the ordinary meaning of the statutory text and various contextual clues, considered in light of the Commission's securities-law expertise, the Commission determined that, although the statutory definition should control the interpretation of Dodd-Frank's award provisions, it was ill-suited to the anti-retaliation provisions. That reasonable interpretation is entitled to deference. Pet. App. 10a; *Berman*, 801 F.3d at 155.

2. Petitioner challenges, for the first time, the procedural validity of the Commission's regulation. Pet. Br. 6-7, 41-45. Petitioner contends that the notice of proposed rulemaking did not adequately alert interested parties that the Commission was contemplating the course it ultimately took, and that the Commission in announcing Rule 21F-2 did not adequately explain its

decision to depart from the statutory definition of "whistleblower." Those challenges are not properly before this Court because they were not pressed or passed on in either of the courts below, see *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 n.2 (2017); see also *McLane Co.* v. *EEOC*, 137 S. Ct. 1159, 1170 (2017) (this Court is "a court of review, not of first view") (citation omitted), and because they were "not presented in the petition for certiorari," *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 580 n.3 (2010).

In any event, petitioner's procedural challenges are unfounded. The notice of proposed rulemaking provided ample notice of the Commission's interest in receiving public comment on appropriate measures to protect and promote internal whistleblowing, including through the anti-retaliation provisions.[17] It was therefore "reasonably foreseeable" that the Commission would interpret the anti-retaliation provisions to protect internal whistleblowing. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 175 (2007). And the adopting release's multi-page analysis and comment citations fully explained the regulation's consistency with the statute.[18] See *ibid.* (finding less-developed explanation sufficient).

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[17] See 75 Fed. Reg. 70,488, 70,495, 70,511 & q.42 (Nov. 17, 2010) (soliciting comment on whether and how to promulgate rules interpreting Section 78u-6(h)(1); whether to adopt a "broadened" application of Section 78u-6(h)(1); and whether other proposed rules "provide sufficient incentives" to use internal compliance processes or whether to adopt further rules to "promote effective self-policing and self-reporting ... consistent with [Section 21F's] goals and text").

[18] See 76 Fed. Reg. at 34,302-34,304 & nn.21, 23, 37-39; *id.* at 34,317 n.149; *id.* at 34,323-34,327, n.207, 230; *id.* at 34,359-34,362 & nn.449-

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ROBERT B. STEBBINS
General Counsel
MICHAEL A. CONLEY
Solicitor
THOMAS J. KARR
Assistant General Counsel
STEPHEN G. YODER
Senior Litigation Counsel
DINA B. MISHRA
Attorney
Securities And Exchange Commission

NOEL J. FRANCISCO
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General

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450 (analyzing "[s]pecifically" how clause (iii) "incorporate[s]" statutory disclosures to non-Commission recipients and does not make protection from job-related retaliation contingent on eligibility for an award; and discussing, and citing comment letters on, the importance of preserving internal compliance reporting despite award incentives for reporting to the Commission).

APPENDIX

1. 15 U.S.C. 78u-6 provides:

Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

(1) Covered judicial or administrative action

The term "covered judicial or administrative action" means any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000.

(2) Fund

The term "Fund" means the Securities and Exchange Commission Investor Protection Fund.

(3) Original information

The term "original information" means information that—

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

(4) Monetary sanctions

The term "monetary sanctions", when used with respect to any judicial or administrative action, means—

(A) any monies, including penalties, disgorgement, and interest, ordered to be paid; and

(B) any monies deposited into a disgorgement fund or other fund pursuant to section 308(b) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246(b)), as a result of such action or any settlement of such action.

(5) Related action

The term "related action", when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

(6) Whistleblower

The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

(b) Awards

(1) In general

In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—

(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and

(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

(2) Payment of awards

Any amount paid under paragraph (1) shall be paid from the Fund.

(c) Determination of amount of award; denial of award

(1) Determination of amount of award

(A) Discretion

The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria

In determining the amount of an award made under subsection (b), the Commission—

(i) shall take into consideration—

(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund.

(2) Denial of award

No award under subsection (b) shall be made—

(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board; or

(v) a law enforcement organization;

(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 78j-1 of this title; or

(D) to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.

(d) Representation

(1) Permitted representation

Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

(2) Required representation

(A) In general

Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

(B) Disclosure of identity

Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Commission may require, directly or through counsel for the whistleblower.

(e) No contract necessary

No contract with the Commission is necessary for any whistleblower to receive an award under subsection (b), unless otherwise required by the Commission by rule or regulation.

(f) Appeals

Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Commission. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission. The court shall review the determi-

nation made by the Commission in accordance with section 706 of title 5.

(g) Investor Protection Fund

(1) Fund established

There is established in the Treasury of the United States a fund to be known as the "Securities and Exchange Commission Investor Protection Fund".

(2) Use of Fund

The Fund shall be available to the Commission, without further appropriation or fiscal year limitation, for—

(A) paying awards to whistleblowers as provided in subsection (b); and

(B) funding the activities of the Inspector General of the Commission under section 78d(i) of this title.

(3) Deposits and credits

(A) In general

There shall be deposited into or credited to the Fund an amount equal to—

(i) any monetary sanction collected by the Commission in any judicial or administrative action brought by the Commission under the securities laws that is not added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) or otherwise distributed to

victims of a violation of the securities laws, or the rules and regulations thereunder, underlying such action, unless the balance of the Fund at the time the monetary sanction is collected exceeds $300,000,000;

(ii) any monetary sanction added to a disgorgement fund or other fund under section 308 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7246) that is not distributed to the victims for whom the Fund was established, unless the balance of the disgorgement fund at the time the determination is made not to distribute the monetary sanction to such victims exceeds $200,000,000; and

(iii) all income from investments made under paragraph (4).

(B) Additional amounts

If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.

(4) Investments

(A) Amounts in Fund may be invested

The Commission may request the Secretary of the Treasury to invest the portion of the Fund that is not, in the discretion of the Commission, required to meet the current needs of the Fund.

(B) Eligible investments

Investments shall be made by the Secretary of the Treasury in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Fund as determined by the Commission on the record.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Fund shall be credited to the Fund.

(5) Reports to Congress

Not later than October 30 of each fiscal year beginning after July 21, 2010, the Commission shall submit to the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives a report on—

(A) the whistleblower award program, established under this section, including—

(i) a description of the number of awards granted; and

(ii) the types of cases in which awards were granted during the preceding fiscal year;

(B) the balance of the Fund at the beginning of the preceding fiscal year;

(C) the amounts deposited into or credited to the Fund during the preceding fiscal year;

(D) the amount of earnings on investments made under paragraph (4) during the preceding fiscal year;

(E) the amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to subsection (b);

(F) the balance of the Fund at the end of the preceding fiscal year; and

(G) a complete set of audited financial statements, including—

(i) a balance sheet;

(ii) income statement; and

(iii) cash flow analysis.

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employ-

ment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-l(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

(B) Enforcement

(i) Cause of action

An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C).

(ii) Subpoenas

A subpoena requiring the attendance of a witness at a trial or hearing conducted under this section may be served at any place in the United States.

(iii) Statute of limitations

(I) In general

An action under this subsection may not be brought—

(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or

(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).

(II) Required action within 10 years

Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs.

(C) Relief

Relief for an individual prevailing in an action brought under subparagraph (B) shall include—

(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;

(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and

(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.

(2) Confidentiality

(A) In general

Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C). For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section.

(B) Exempted statute

For purposes of section 552 of title 5, this paragraph shall be considered a statute described in subsection (b)(3)(B) of such section 552.

(C) Rule of construction

Nothing in this section is intended to limit, or shall be construed to limit, the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(D) Availability to government agencies

(i) In general

Without the loss of its status as confidential in the hands of the Commission, all information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to—

(I) the Attorney General of the United States;

(II) an appropriate regulatory authority;

(III) a self-regulatory organization;

(IV) a State attorney general in connection with any criminal investigation;

(V) any appropriate State regulatory authority;

(VI) the Public Company Accounting Oversight Board;

(VII) a foreign securities authority; and

(VIII) a foreign law enforcement authority.

(ii) Confidentiality

(I) In general

Each of the entities described in subclauses (I) through (VI) of clause (i) shall maintain such information as confidential in accordance with the requirements established under subparagraph (A).

(II) Foreign authorities

Each of the entities described in subclauses (VII) and (VIII) of clause (i) shall maintain such information in accordance with such assurances of confidentiality as the Commission determines appropriate.

(3) Rights retained

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any whistleblower under any Federal or State law, or under any collective bargaining agreement.

(i) Provision of false information

A whistleblower shall not be entitled to an award under this section if the whistleblower—

(1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or

(2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.

(j) Rulemaking authority

The Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with the purposes of this section.

2. 18 U.S.C. 1514A provides:

Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

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[1] So in original. Another closing parenthesis probably should precede the comma.

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or

condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

3. 15 U.S.C. 78j-1 provides in pertinent part:

Audit requirements

* * * * *

(b) Required response to audit discoveries

(1) Investigation and report to management

If, in the course of conducting an audit pursuant to this chapter to which subsection (a) of this section applies, the registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, as may be modified or supplemented from time to time by the Commission—

(A)(i) determine whether it is likely that an illegal act has occurred; and

(ii) if so, determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary

effects, such as fines, penalties, and damages; and

(B) as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of such firm in the course of the audit, unless the illegal act is clearly inconsequential.

(2) Response to failure to take remedial action

If, after determining that the audit committee of the board of directors of the issuer, or the board of directors of the issuer in the absence of an audit committee, is adequately informed with respect to illegal acts that have been detected or have otherwise come to the attention of the firm in the course of the audit of such firm, the registered public accounting firm concludes that—

(A) the illegal act has a material effect on the financial statements of the issuer;

(B) the senior management has not taken, and the board of directors has not caused senior management to take, timely and appropriate remedial actions with respect to the illegal act; and

(C) the failure to take remedial action is reasonably expected to warrant departure from a standard report of the auditor, when made, or warrant resignation from the audit engagement;

the registered public accounting firm shall, as soon as practicable, directly report its conclusions to the board of directors.

(3) Notice to Commission; response to failure to notify

An issuer whose board of directors receives a report under paragraph (2) shall inform the Commission by notice not later than 1 business day after the receipt of such report and shall furnish the registered public accounting firm making such report with a copy of the notice furnished to the Commission. If the registered public accounting firm fails to receive a copy of the notice before the expiration of the required 1-business-day period, the registered public accounting firm shall—

(A) resign from the engagement; or

(B) furnish to the Commission a copy of its report (or the documentation of any oral report given) not later than 1 business day following such failure to receive notice.

(4) Report after resignation

If a registered public accounting firm resigns from an engagement under paragraph (3)(A), the firm shall, not later than 1 business day following the failure by the issuer to notify the Commission under paragraph (3), furnish to the Commission a copy of the report of the firm (or the documentation of any oral report given).

* * * * *

(m) Standards relating to audit committees

(1) Commission rules

(A) In general

Effective not later than 270 days after July 30, 2002, the Commission shall, by rule, direct the national securities exchanges and national securities associations to prohibit the listing of any security of an issuer that is not in compliance with the requirements of any portion of paragraphs (2) through (6).

(B) Opportunity to cure defects

The rules of the Commission under subparagraph (A) shall provide for appropriate procedures for an issuer to have an opportunity to cure any defects that would be the basis for a prohibition under subparagraph (A), before the imposition of such prohibition.

(2) Responsibilities relating to registered public accounting firms

The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee.

(3) Independence

(A) In general

Each member of the audit committee of the issuer shall be a member of the board of directors of the issuer, and shall otherwise be independent.

(B) Criteria

In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee—

(i) accept any consulting, advisory, or other compensatory fee from the issuer; or

(ii) be an affiliated person of the issuer or any subsidiary thereof.

(C) Exemption authority

The Commission may exempt from the requirements of subparagraph (B) a particular relationship with respect to audit committee members, as the Commission determines appropriate in light of the circumstances.

(4) Complaints

Each audit committee shall establish procedures for—

(A) the receipt, retention, and treatment of complaints received by the issuer regarding ac-

counting, internal accounting controls, or auditing matters; and

(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(5) Authority to engage advisers

Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

(6) Funding

Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation—

(A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and

(B) to any advisers employed by the audit committee under paragraph (5).

4. 15 U.S.C. 7245 provides:

Rules of professional responsibility for attorneys

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

5. 18 U.S.C. 1513(e) provides:

Retaliating against a witness, victim, or an informant

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

6. 17 C.F.R. 240.21F-2 provides:

Whistleblower status and retaliation protection.

(a) *Definition of a whistleblower.* (1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

(2) To be eligible for an award, you must submit original information to the Commission in accordance with the procedures and conditions described in §§240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

(b) *Prohibition against retaliation.* (1) For purposes of the anti-retaliation protections afforded by Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), you are a whistleblower if:

(i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions set forth in 18 U.S.C. 1514A(a)) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in Section 21F(h)(1)(A) of the Exchange Act (15 U.S.C. 78u-6(h)(1)(A)).

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.

(2) Section 21F(h)(1) of the Exchange Act (15 U.S.C. 78u-6(h)(1)), including any rules promulgated thereunder, shall be enforceable in an action or proceeding brought by the Commission.

7. 17 C.F.R. 240.21F-9 provides:

Procedures for submitting original information.

(a) To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u-6(h)), you must submit your information about a possible securities law violation by either of these methods:

(1) Online, through the Commission's Web site located at *http://www.sec.gov;* or

(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in §249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549-5631, Fax (703) 813-9322.

(b) Further, to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1) or (2) of this section that your information is true and correct to the best of your knowledge and belief.

(c) Notwithstanding paragraphs (a) and (b) of this section, if you are providing your original information to the Commission anonymously, then your attorney

must submit your information on your behalf pursuant to the procedures specified in paragraph (a) of this section. Prior to your attorney's submission, you must provide your attorney with a completed Form TCR (referenced in §249.1800 of this chapter) that you have signed under penalty of perjury. When your attorney makes her submission on your behalf, your attorney will be required to certify that he or she:

(1) Has verified your identity;

(2) Has reviewed your completed and signed Form TCR (referenced in §249.1800 of this chapter) for completeness and accuracy and that the information contained therein is true, correct and complete to the best of the attorney's knowledge, information and belief;

(3) Has obtained your non-waivable consent to provide the Commission with your original completed and signed Form TCR (referenced in §249.1800 of this chapter) in the event that the Commission requests it due to concerns that you may have knowingly and willfully made false, fictitious, or fraudulent statements or representations, or used any false writing or document knowing that the writing or document contains any false fictitious or fraudulent statement or entry; and

(4) Consents to be legally obligated to provide the signed Form TCR (referenced in § 249.1800 of this chapter) within seven (7) calendar days of receiving such request from the Commission.

(d) If you submitted original information in writing to the Commission after July 21, 2010 (the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act) but before the effective date

of these rules, your submission will be deemed to satisfy the requirements set forth in paragraphs (a) and (b) of this section. If you were an anonymous whistleblower, however, you must provide your attorney with a completed and signed copy of Form TCR (referenced in §249.1800 of this chapter) within 60 days of the effective date of these rules, your attorney must retain the signed form in his or her records, and you must provide of copy of the signed form to the Commission staff upon request by Commission staff prior to any payment of an award to you in connection with your submission. Notwithstanding the foregoing, you must follow the procedures and conditions for making a claim for a whistleblower award described in §§ 240.21F-10 and 240.21F-11 of this chapter.